

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 88

Docket No. CH-844E-09-0813-I-1

**Sandra Sutton,
Appellant,
v.
Office of Personnel Management,
Agency.**

May 7, 2010

Sandra Sutton, Downers Grove, Illinois, pro se.

Charlretta T. McNeill, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that affirmed the Office of Personnel Management's reconsideration decision denying her application for disability retirement. For the reasons set forth below, we DISMISS the petition as untimely filed with no showing of good cause for the delay.

BACKGROUND

¶2 The appellant was a Mark-up Clerk for the U.S. Postal Service from 1988 until her removal in March 2006. *See* Initial Appeal File (IAF), Tab 8, Subtab

II(A) at 1; *id.*, Subtab II(E) at 1. Following her removal, the appellant applied for disability retirement under the Federal Employees' Retirement System, asserting that she became unable to perform the duties of her position due to a number of medical conditions, including allergies and pulmonary and heart disease. *Id.*, Subtab II(D) at 1-2. The Office of Personnel Management issued a decision denying the appellant's application for disability retirement, stating that the appellant failed to show that she was disabled from useful and efficient service based on her medical conditions. *Id.*, Subtab II(C) at 3. Following the Office of Personnel Management's issuance of a reconsideration decision upholding its initial decision, *see id.*, Subtab II(A) at 1-4, the appellant filed an appeal with the Board, *see* IAF, Tab 1.

¶3 The administrative judge denied the appellant's request for a hearing as untimely filed and based the initial decision on the written record. IAF, Tab 14, Initial Decision at 1. She found that the appellant's medical evidence lacked objective findings and that the appellant failed to submit evidence that her conditions were disabling at the time of her removal. *Id.* at 6. She thus found that, although the appellant showed that she suffered from symptoms caused by allergies, she failed to provide adequate evidence of her medical condition, the degrees of her impairment, and the clinical course of treatment around the time of her removal in 2006. *Id.* at 6-7. Accordingly, she concluded that the appellant failed to provide sufficient objective evidence to support a finding that her medical conditions entitled her to a disability retirement, and she affirmed the Office of Personnel Management's reconsideration decision denying the appellant's application for disability retirement. *Id.* at 7-8.

¶4 The appellant has filed a petition for review. *See* Petition for Review (PFR) File, Tabs 1, 3. The Office of the Clerk of the Board issued an acknowledgment letter notifying the appellant that her petition appeared untimely and allowing her to file a motion to accept it as timely or to waive the time limit

for good cause shown. *Id.*, Tab 2 at 1. The appellant filed such a motion with the regional office, which forwarded it to the Office of the Clerk. *Id.*, Tab 3.

ANALYSIS

¶5 A petition for review must be filed within thirty-five days after the date of issuance of the initial decision. *Williams v. Office of Personnel Management*, [109 M.S.P.R. 237](#), ¶ 7 (2008); *Stribling v. Department of Education*, [107 M.S.P.R. 166](#), ¶ 7 (2007); [5 C.F.R. § 1201.114](#)(d). The Board will waive the filing deadline for a petition for review only upon a showing of good cause for the delay in filing. *Lawson v. Department of Homeland Security*, [102 M.S.P.R. 185](#), ¶ 5 (2006); 5 C.F.R. §§ 1201.12, 1201.114(f).

¶6 The initial decision was issued on November 17, 2009, and informed the appellant that, to be timely, a petition for review had to be filed by December 22, 2009. Initial Decision at 1, 8. It also informed her that if she proved that she received the initial decision more than 5 days after the date of issuance, she could file a petition for review within 30 days after the date she actually received the decision. *Id.* at 8. The appellant filed her petition for review on January 22, 2010. *See* PFR File, Tab 1 at 12. Because her petition appeared untimely, the Clerk of the Board issued an acknowledgment letter, affording the appellant an opportunity to submit proof that her petition was filed on time or was filed late with good cause. PFR File, Tab 2 at 1-2. In response, the appellant submitted a motion to accept the filing as timely or to waive the time limit for good cause shown. *See* PFR File, Tab 3. In her response, the appellant asserts that she filed her petition on time because the initial decision was mailed to a post office box and she did not retrieve it until December 1, 2009. PFR File, Tab 3 at 3. She further asserts that she did not read it until January 8, 2010. *Id.*

¶7 Even assuming that the appellant did not receive the initial decision until December 1, 2009, her petition for review is still untimely as it would have been required to be filed by December 31, 2009. *See* [5 C.F.R. § 1201.114](#)(d). The fact

that the appellant did not read the initial decision until January 8, 2010, is irrelevant in determining the date by which her petition for review was required to be filed in order to be considered timely. *See id.* Accordingly, the appellant has not shown that her petition for review should be considered timely on the basis that her receipt of the initial decision was delayed.

¶8 In her response to the acknowledgment letter from the Clerk of the Board, the appellant also asks that the Board waive the deadline for filing her petition for review because she was homeless and because she had moved. PFR File, Tab 3 at 3. To establish good cause for an untimely filing, the appellant must show that she exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980). Factors that are considered in the determination of good cause include the length of the delay, the reasonableness of the excuse and showing of due diligence, whether the appellant is proceeding pro se, and whether she has presented evidence of the existence of circumstances beyond her control that affected her ability to comply with the time limits or of unavoidable casualty or misfortune that similarly shows a causal relationship to her inability to file her petition in a timely manner. *See Wyeroski v. Department of Transportation*, [106 M.S.P.R. 7](#), ¶ 7, *aff'd*, 253 F. App'x 950 (Fed. Cir. 2007).

¶9 In support of her claim that she was homeless, the appellant submits a letter from a homeless shelter stating that she was homeless as of June 3, 2009, and that she had been staying at the shelter since April 13, 2009. *See* PFR File, Tab 3, DVD, Exhibit (Ex.) 28. However, this evidence establishes only that the appellant was homeless seven months before the initial decision was issued. The appellant failed to submit evidence indicating that she was homeless when the initial decision was issued or when she received it. Moreover, she concurrently asserts that she was in the process of moving following the issuance of the initial decision. In support of her claim that she was unable to timely file her petition for review because she was moving, the appellant submits relevant contracts from

moving and storage companies dated January 2, 2010, January 15, 2010, and February 1, 2010. *See id.*, Ex. 30. However, the appellant fails to explain how moving prevented her from timely filing her petition for review or from filing a request for an extension of time to file her petition for review. We therefore find that the mere fact of moving during the relevant time period is inadequate to show good cause for the appellant's delay where she was informed of the deadline and has not shown that she exercised diligence and ordinary prudence in pursuing her appeal.

¶10 The appellant also asks the Board to waive the filing deadline because she was ill and was not receiving her medications. PFR File, Tab 3 at 3. The Board will find good cause for a filing delay where an appellant has demonstrated that she suffered from an illness that affected her ability to file on time. *Lacy v. Department of the Navy*, [78 M.S.P.R. 434](#), 437 (1998). To establish that an untimely filing was the result of an illness, the party must: (1) Identify the time period during which he suffered from the illness; (2) submit medical evidence showing that he suffered from the alleged illness during that time period; and (3) explain how the illness prevented him from timely filing his appeal or a request for an extension of time. *Lacy*, 78 M.S.P.R. at 437. While there is no general incapacitation requirement, the appellant is required to explain only why her alleged illness impaired her ability to meet the Board's filing deadline or seek an extension of time. *Lacy*, 78 M.S.P.R. at 437 n.*.

¶11 The appellant submits voluminous medical records dating from 1992 to 2010. *See* PFR File, Tab 3, DVD, Exs. 8, 11. Very few of the medical records submitted by the appellant are relevant to the issue of the timeliness of her petition for review as they do not provide evidence of the appellant's medical condition at the time of and following the November 17, 2009 issuance of the initial decision until the appellant filed her petition for review on January 22, 2010. Records from Mount Sinai Hospital Medical Center indicate that the appellant took part in a sleep apnea screening on November 28, 2009, *see id.*, Ex.

8, Sleep Apnea Study at 1-2, and records from Advocate Good Samaritan Hospital indicate that the appellant was admitted to the hospital on November 20, 2009, after presenting to the emergency room with dizziness and high blood pressure, *see id.*, Ex. 11, Advocate Test Results at 2-3. The records also reveal that she was discharged the next day, on November 21, 2009, in stable condition with instructions to follow up with her primary care physician. *See id.* at 4. However, although the appellant received notice of the *Lacy* standard, *see* PFR File, Tab 2 at 6 n.1, she failed to account for her filing delay by explaining how these conditions prevented her from timely filing her petition for review or a request for an extension of time, *see Brenner v. U.S. Postal Service*, [80 M.S.P.R. 394](#), ¶ 7 (1998), *aff'd*, 215 F.3d 1346 (Fed. Cir. 1999) (Table).

¶12 We note that, although the delay in this case is not especially lengthy, it is not minimal. *See Gonzalez v. Department of Veterans Affairs*, [111 M.S.P.R. 697](#), ¶ 11 (2009) (8-day delay in filing a petition for review is not minimal). In any event, we have consistently denied a waiver of our filing deadline if a good reason for the delay is not shown, even where the delay is minimal and the appellant is pro se. *E.g., Schuringa v. Department of the Treasury*, [106 M.S.P.R. 1](#), ¶¶ 4 n.*, 9, 14 (2007) (declining to excuse a 4-day delay in filing an appeal where the pro se appellant's submissions did not support a finding that she was medically prevented from timely filing her appeal or from requesting an extension of time); *Lockhart v. Office of Personnel Management*, [94 M.S.P.R. 396](#), ¶¶ 7-8 (2003) (declining to excuse a 5-day delay in filing a petition for review where the pro se appellant failed to show good cause for the delay); *Gaddy v. Department of the Army*, [92 M.S.P.R. 315](#), ¶¶ 3, 6-7 (2002) (declining to excuse a pro se appellant's 8-day delay in filing a petition for review where the appellant failed to show good cause for the delay), *review dismissed*, 55 F. App'x 566 (Fed. Cir. 2003).

¶13 We find that the appellant has failed to show that she exercised the due diligence or ordinary prudence in this case that would justify waiving the filing

deadline. Accordingly, we dismiss the petition for review as untimely filed with no good cause shown for the delay in filing.

ORDER

¶14 This is the final decision of the Merit Systems Protection Board regarding the timeliness of the petition for review. The initial decision will remain the final decision of the Board. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the

court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.